

§ 4 Geo-regional human rights law

I. European human rights law (overview)

1 The European Convention on Human Rights (ECHR) and its protocols

a) The guaranteed rights (see → list from another course at UGM)

- essential civil and political rights and complementing prohibitions for an effective basic protection of human rights
- some classical rights are missing but have been partially compensated in the jurisprudence
 - no freedom of occupation, no general right to equality...
 - freedoms of press, arts and science derived from art. 10 as parts of freedom of expression
 - various rights concerning data protection and personal identity derived from art. 8 as parts of the right to respect for private life
- a strong point: central elements of the rule of law anchored as human rights
 - e.g. rights to a fair trial (art. 6) and an effective remedy (art. 3), nulla poena sine lege (art. 7), ne bis in idem (art. 4 Prot. 7)
 - abundant jurisprudence on these rights shaped and consolidated rule of law in Europe

b) The specific limitation clauses

- for the protection of human rights not the formulation of the rights but of their limits is decisive...
- specific limitation clauses for a sophisticated, *differentiated h.r. protection*
- many freedoms may only be subjected to restrictions that are
 - prescribed by law (not necessarily statutory law) and
 - necessary in a democratic society (with pluralism, tolerance, openness etc.)
 - in the interests of national security or public safety, for prevention of disorder or crime, protection of health or morals or protection of rights and freedoms of others
- problem: human rights restrictions for the *protection of morals*?
 - enforcement of morality not a legitimate mission of the state but task of society

c) The European Convention as a "living instrument"

- in decades of coherent and consistent jurisprudence, ECtHR has developed the Convention to a powerful h.r. regime far beyond its wording
 - wide interpretation of the rights' scope of protection, closing gaps and compensating for missing rights
 - restrictive interpretation of the outdated, far-reaching limitation clauses
 - development of a consistent, sophisticated human rights doctrine
- is the Convention still a "second safety net"?

2) The European Court of Human Rights (ECtHR)

- an international court, whose *decisions are legally binding*, as treaty-body of the European Convention
 - do not confuse with the European Court of Justice (ECJ) in Luxembourg!
 - has delivered more than 10.000 judgements
 - can find that the Convention has been violated but cannot annul the attacked decision
- composed of 47 judges with a 9 years term, usually deciding in Chambers or Grand Chambers (of 7 / 17 judges)
- *individual complaints* by individuals, groups of persons or NGOs (art. 34 ff.)
 - within 6 months, after domestic remedies have been exhausted, if applicant is personally and directly concerned, has suffered significant disadvantage and application is not manifestly ill-founded or abusive
- also hears interstate complaints (art. 33) and gives opinions (art. 47) and advisory opinions (on request of high courts, Prot. 16)
- can afford just satisfaction (compensation) to the injured party (art. 41)
- execution of judgements supervised by Council of Europe's Committee of Ministers (art. 46)

3) European human rights treaties on special subjects

- *European Social Charter*
 - economic and social rights (also in Additional Protocol)
 - states only obliged to take measures to promote their realisation
 - original version of 1961 and revised version of 1996 with improved control mechanism
- *European Convention for the Prevention of Torture and Inhuman or Degrading Treatment or Punishment (ECPT)* of 1997
 - enhanced control mechanisms, including ad hoc visits of places of detention
- Framework Convention for the Protection of National Minorities (FCNM) of 1995
- European Charter for Regional or Minority Languages (ECRML) of 1992
- Convention on Human Rights and Biomedicine (CHRB) of 1997
 - prohibition of reproductive cloning of human beings
 - prohibition of making the human body and its parts as such a source of financial gain

4) The Charter of Fundamental Rights of the European Union

- an own f.r. catalogue for the EU, because it exercises on a large scale supran. public power
 - member states only bound when implementing or executing EU law or interfering with economic fundamental freedoms
- *one of the most modern f.r. catalogues in the world, with many innovative approaches*
 - contemporary and precise wording
 - clear structure based on innovative classification of the rights
 - anti-neoliberal approach (social rights, horizontal effect, business restrictions etc.)
 - innovative: restrictions of biomedicine (art. 3(2)), freedom to conduct a business (art. 16), cultural, religious and linguistic diversity (art. 22), rights of child and of elderly (art. 24, 25)
- substandard system of f.r. limits (undifferentiated general limitation clause for most rights, transfer of archaic limits from ECHR to corresponding Charter rights, art. 52)

II. American human rights law (overview)

- h.r. promotion a mission of the *Organisation of American States (OAS)*

1) The American Convention on Human Rights (ACHR) of 1969

a) Guaranteed rights

- essential civil and political rights, some central rule of law elements
- economic, social and cultural rights under OP of 1988
 - only obligation to adopt measures (art. 1)
- prohibition of death penalty under OP of 1990
- obligation to criminalise propaganda for war and advocacy of national, racial, or religious hatred inciting to violence (a limit to freedom of thought and expression, art. 13(5))
- IACtHR has declared incompatible national legislation inapplicable

b) Control mechanisms

- state reporting procedure (for OP)
- state reports of the Commission
- opinions of the IACtHR (art. 64)
- interstate complaints (optional under art. 45, not yet in practice)
- *individual complaints* by individuals, groups of persons or NGOs (art. 44)
 - first petition before Commission, examination and decision and, where appropriate, recommendations of Commission (art. 51)
 - then, where appropriate, submission of the case to the Court by Commission or a state and decision by the court (art. 61, 63)

2) **The Inter-American Commission of Human Rights in Washington D.C.**

- OAS institution and ACHR treaty body
 - legal basis: art. 53 lit. e, 106 OAS Charter, art. 34 ff. ACHR, IACtHR Statute
- 7 members with a 4 years term
- deals with indiv. complaints, monitors h.r. situation and works on priority thematic areas
 - *thematic rapporteurships* for different fields of human rights

3) **The Inter-American Court of Human Rights in San José (IACtHR)**

- international court and treaty body, whose decisions are legally binding
 - legal basis: art. 52 ff. ACHR, IACtHR Statute; jurisdiction only for states who recognized (art. 62))
- 7 part-time judges with a 6 years term
- cases can only be submitted by states and Commission (art. 61(1))
- can adopt provisional measures and order remedial action or compensation (art. 63)
- no mechanism to enforce execution of judgements

4) **American human rights treaties on special subjects**

- Inter-American Conventions
 - to Prevent and Punish Torture (IACPPT) of 1985
 - on Forced Disappearance of Persons (IACFDP) of 1994 (→ indiv. complaints)
 - on the Prevention, Punishment and Eradication of Violence Against Women of 1994 (→ indiv. complaints)
 - on the Elimination of all Forms of Discriminations against Persons with Disabilities of 1999
 - against all Forms of Discrimination and Intolerance and against Racism, Racial Discrimination and Related Forms of Intolerance of 2013
 - on Protecting the Human Rights of Older Persons of 2015
- only "soft law": American Declaration of the Rights and Duties of Man of 1948

III. **African human rights law (overview)**

- h.r. promotion and protection an objective of the African Union (AU) (art. 3 lit. h AU Const. Act)

1) **The African Charter on Human and Peoples' Rights (Banjul Charta) of 1981**

- *African human rights concept* (collective rights of the peoples, duties of the individual, importance of the community, elimination of foreign economic exploitation)
- a) **Guaranteed rights**
 - civil and political rights, some central rule of law elements
 - right to asylum (art. 12(3))
 - economic, social and cultural rights (art. 13 et seq.)
 - rights of women under Protocol on the Rights of Women in Africa (2003)
 - *collective rights of the peoples* (equality, existence, self-determination, development, peace and security, free disposal of natural resources etc., art. 19 et seq.)
- b) **Control mechanisms**
 - state reporting procedure (art. 62)
 - interstate complaints (art. 47 et seq.)
 - opinions of the ACtHPR (art. 4 ACHPR Protocol)
 - *individual complaints* (art. 56 et seq.)
 - first petition before Commission, consideration and recommendations by Commission (cf. art. 45(1) lit. a, 56), then submission of the case to the Court by Commission, a state (has not happened so far) or African GO (art. 5 ACtHPR Prot.)

- or direct submission to Court by NGO with observer status or citizen (optional, cf. art. 5(3), 34(6) ACtHPR Prot. - in 2020 accepted by 6 states)
- then decision by the court (art. 28 ACtHPR Protocol)

2) **The African Commission on Human and Peoples' Rights in Banjul**

- an ACHPR treaty body (legal basis: art. 30 ff. ACHPR)
- 11 members with a 6 years term
- interprets ACHPR provisions on request (art. 45(3))

3) **The African Court of Human and Peoples' Rights in Arusha (ACtHPR)**

- international court and treaty body, whose decisions are legally binding
 - legal basis: ACtHPR Prot.; jurisdiction only for states who ratified it)
- 11 judges with a 6 years term
- cases can be submitted by Commission, states, African GOs and also by NGOs and citizens (optional)
- can adopt provisional measures and order remedial action or compensation (art. 27)
- no mechanism to enforce the execution of the judgements but execution monitored by AU Council of Ministers (art. 29(2))
- *crisis in 2020* after 4 states have withdrawn from accepting direct individual complaints

4) **African human rights treaties on special subjects**

- OAU-Convention Governing the Specific Aspects of Refugee Rights in Africa of 1969
- African Charter on the Rights and Welfare of the Child (ACRW) of (1990)
- African Charter on Democracy, Elections and Governance of 2007
 - provides for AU sanctions in case of case of unconstitutional changes of government (art. 23 et seq.)

IV. **The controversial Arab human rights law (short comments from European perspective)**

1) **The Arab Charter on Human Rights of 2004**

- prepared by the League of Arab States
- essential civil and political rights, some rule of law elements, some social, economic and cultural rights, state reporting procedure before a powerless Arab Human Rights Committee
- *incompatible with universal human rights standards*
 - preamble refers to anti-human rights document "Cairo Declaration on Human Rights in Islam" of the Organisation of Islamic Cooperation of 1990
 - men and women are only equal "within the framework of the positive discrimination established in favour of women by the Islamic Shariah, other divine laws..." (art. 3(3))
 - allows death penalty for children (art.7(1))
 - freedom of expression only if "exercised in conformity with the fundamental values of society" (art. 32(2))

2) **The projected Arab Court of Human Rights in Manama City (Bahrain)**

- see Statute of the Arab Court of Human Rights of 2014 (not yet in force), which has been strongly criticised by human rights and lawyers associations
- *cases cannot be submitted by citizen* but only by states and NGOs accredited in the state (optional)

V. **The missing Asian human rights law (short comments from European perspective)**

1) **"Asian values" and the long way to the acceptance of the idea of human rights in Asia**

- an ideological approach referring to an East-/Southeast Asian identity based on "Asian values" (less individualism) as antithesis to the "Western" ideas of universal human rights and democracy
- human rights idea rejected by elites until the end of the 90s
 - Bangkok Declaration on Human Rights of 1993 still relativises human rights with regard to sovereignty, non-interference and needs of development
- until today lack of reaction to severe human rights violations in Asia (Myanmar, China, India etc.)

2) **The lack of pan-Asian human rights treaties**

3) The ASEAN Human Rights Declaration (AHRD) of 2012

- a *political declaration* with *little practical impact* but relevant for the ASEAN h.r. discourse
- *prepared* by an inter-governmental body (ASEAN Intergovernmental Commission on Human Rights) *without public discourse* or consultation of civil society
- background: *ASEAN principles* include adherence to rule of law and respect and protection of human rights (cf. art. 2(2) lit. h, i ASEAN Charter) but strong emphasis on sovereignty, non-interference and "Asian values" doctrine obstruct introduction of a binding Southeast Asian h.r. regime
- proclaims civil and political rights (art. 10 et seq.), justice rights (art. 5, 20) and economic, social and cultural rights (art. 26 et seq.)
 - includes some innovative approaches (e.g. right to safe drinking water and sanitation, art. 28 lit. e)
 - but fails to include some important rights (e.g. freedom of association)
- criticised by experts for *clauses that dilute or restrict the significance or substance of the rights*
 - e.g. demanding that their enjoyment "must be balanced with the performance of corresponding duties" and stressing the "responsibilities to ... the community and the society" (art. 6)
 - e.g. relativising them by pretending that their "realisation ... must be considered in the regional and national context bearing in mind different political, economic, legal, social, cultural, historical and religious backgrounds" (art. 7)